

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RODNEY D. TIBBITS
Claimant

VS.

SHAWNEE COUNTY
Respondent
Self-Insured

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Docket No. 198,464

ORDER

On October 29, 1997, the application of claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Bryce D. Benedict on May 12, 1997, came on for oral argument in Topeka, Kansas.

APPEARANCES

Claimant appeared by and through his attorney, Beth Regier Foerster of Topeka, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, Larry G. Karns of Topeka, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board. In addition, the parties stipulated the date of accident to be November 14, 1994, and the Award of the Administrative Law Judge shall be modified accordingly.

ISSUES

- (1) The nature and extent of claimant's injury and/or disability.
- (2) Whether claimant provided notice to the respondent of the injury pursuant to K.S.A. 44-520 or, if not, whether there was just cause for claimant's failure to provide notice.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the entire evidentiary record, and considering the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Findings of Fact

Claimant suffered accidental injury through his last day worked, November 14, 1994, with the injury alleged to the right leg, hip, and low back. Claimant contends the neuropathy in claimant's right lateral femur, which caused meralgia parasthesias, was significantly contributed to by claimant's wearing a heavy gun belt and a leather holster while working.

Respondent contends claimant left work on November 14, 1994, when he took sick leave after having been passed over for promotion. When claimant first obtained treatment with Dr. Edward Russell Wood on November 18, 1994, he made no mention of back or leg problems. He did register complaints of fatigue and frustration with his job situation and indicated he needed time away from work in order to get himself back together. He was given an off-work slip by Dr. Wood dated November 18, 1994.

Claimant first noticed problems with his leg in July of 1990. At that time, he was being treated by Dr. David A. Fitzgerald. When claimant was being examined in 1990, Dr. Fitzgerald opined that the leg pain was perhaps not related to the gun belt. However, Dr. Wood in 1990, felt that the pressure from the gun belt against claimant's anterior thigh did have some effect and, at that time, advised claimant to avoid direct trauma to the hip and prescribed a pad to reduce the pressure caused by the gun belt on claimant's leg.

When Dr. Wood saw claimant in December 1994, he still thought that claimant's symptoms were related to the pressure of the holster and he recommended that claimant see Dr. Jonson Huang, a neurologist. When he referred claimant to Dr. Huang, Dr. Wood provided a history of claimant's prolonged paraesthesia over the right lateral leg and raised the issue of whether the symptoms could be related to the pressure from the gun belt.

Dr. Huang treated claimant conservatively, including prescribing Darvocet for the pain. Dr. Huang, after a period of conservative treatment, felt claimant was capable of returning to work and noted the claimant had no physical incapacities. He did, however, recommend an FCE in order to assess claimant's physical status after his having been off work for so long a period of time. Dr. Huang recommended that claimant not drive or return to work while taking Darvocet if claimant was experiencing any symptoms or side effects from the Darvocet. If he was experiencing side effects from the Darvocet then some other medication would be used.

Claimant was examined by Dr. P. Brent Koprivica during an independent medical examination ordered by the Administrative Law Judge. Dr. Koprivica understood the problems associated with the claimant wearing a gun belt and found that the gun belt did put pressure over a trigger area of claimant's lateral femoral cutaneous nerve. He also speculated claimant's ongoing back pain was the result of wearing the heavy gun belt, causing pressure on claimant's low back, but was unable to say so within a reasonable degree of medical probability. He felt claimant's wearing the heavy gun belt would irritate his situation and he didn't believe claimant could return to work under those circumstances. He did say if claimant was offered a shoulder strap to wear it would change his opinion in this regard. He also expressed concern about claimant taking Darvocet while doing police work. He indicated if claimant was able to be off of the Darvocet and could demonstrate appropriate strength he would not limit him in his abilities to perform his officer duties.

In June 1996 respondent provided a letter to claimant offering claimant an accommodated return to work that would allow for claimant to use a shoulder strap or harness rather than the gun belt.

The gun belt issue had been raised by claimant several times prior to claimant's leaving work in November, 1994. Claimant had conversations with several of his supervisors including Sergeant Bentley, Officer Swift, Sergeant Ryan and Sergeant Miller. Claimant identified Sergeant Miller as being top sergeant and his ultimate supervisor. Some of these conversations occurred prior to claimant leaving respondent's employment in November 1994.

After leaving respondent, claimant attempted to obtain employment as a computer operator. Claimant had received only two years part-time computer programmer analysis training at Topeka Technical School from which he graduated in 1990. He had received no additional training as a computer programmer systems analyst. This is the only job for which claimant applied and claimant was unsuccessful in obtaining employment through the date of regular hearing. The Administrative Law Judge noted that claimant had been a sheriff's deputy for 16 years including the time he was attending the Topeka Technical School computer training program and the training was only part-time.

After claimant was offered the return to work position with respondent, claimant provided a June 6, 1996, response letter to the sheriff's office with a list of requests and demands. Claimant's requests primarily centered around back pay, seniority, vacation and sick leave, promotions, and health insurance. The letter also requested a job description of the position offered; a curious request as the return to work offer specified it would be as a sheriff's deputy and the claimant had been performing those duties for 16 years.

Conclusions of Law

K.S.A. 44-520 requires notice of accident to be provided to the employer within 10 days after the date of accident except that actual knowledge of the accident by the

employer or the employers duly authorized agent shall render the giving of such notice unnecessary.

Respondent denies claimant notified them of the accidental injuries to his right leg and back resulting from the trauma of the gun and holster. Respondent argues that when claimant first received treatment from Dr. Wood on November 18, 1994, no mention was made of the back or hip problems. At that time, claimant mentioned only the fact that he had been passed over for a promotion and he was feeling very frustrated with his job.

However, claimant testified to several earlier conversations with various supervisors regarding the gun belt and his request to switch to a shoulder holster. Respondent contends claimant was attempting to obtain advancement to a different position. However, a review of claimant's testimony indicates that he did discuss the holster modification with several of his sergeants prior to November 14, 1994, and while some of these conversations were in the context of claimant attempting to obtain a promotion, there was discussion regarding claimant's ongoing problems with his hip and leg, and the connection between these problems and the gun belt and holster.

The Appeals Board finds that these conversations with claimant's sergeants would be sufficient to place them on notice that claimant was having difficulties with and experiencing symptoms from the wearing of his gun belt. The Appeals Board finds, therefore, that claimant has satisfied the requirements of K.S.A. 44-520 and provided notice to respondent of the accident.

The stipulation by the parties that claimant's accidental injury occurred through November 14, 1994, and not December 14, 1994, as found by the Administrative Law Judge, renders the Administrative Law Judge's conclusions regarding notice and just cause invalid.

With regard to the nature and extent of claimant's injury and/or disability, the Appeals Board considers the evidence provided by Dr. Koprivica and Dr. Huang as persuasive. Dr. Koprivica assessed claimant a 4 percent whole-body impairment for both the femoral cutaneous neuropathy and the low back pain. Dr. Huang rated claimant as having a 4 percent impairment due to the neuropathy and a 5 percent impairment for the low-back pain. Neither Dr. Koprivica nor Dr. Huang was willing to say within a reasonable degree of medical certainty that claimant's wearing of the gun belt aggravated his preexisting degenerative disc disease at L5-S1.

It is claimant's burden in workers compensation litigation to prove his entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g). In this instance the Appeals Board finds claimant has not proven that the wearing of the gun belt caused or contributed to claimant's back condition. The Appeals Board finds, however, that claimant has proven that the wearing of the gun belt caused or contributed to claimant's ongoing right leg and hip symptomatology including the femoral

cutaneous neuropathy. In assessing the impairments provided, the Appeals Board finds that Dr. Huang's 4 percent impairment to the body as a whole resulting from the neuropathy is the most credible and finds claimant has suffered and is awarded a 4 percent whole-body impairment as a result of the injury to his hip and right leg.

The Appeals Board must next consider claimant's entitlement to a work disability as claimant, at the time of regular hearing, had not returned to work.

K.S.A. 44-510e(a) states in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Respondent contends claimant was in violation of the policies set forth by the Court of Appeals in Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In Foult, the Court of Appeals declared that the Workers Compensation Act should not be construed to award work disability benefits to a worker solely for refusing a proper job the worker has the ability to perform. In this instance, respondent offered claimant a return to work at the deputy sheriff's position with the accommodation of the shoulder harness rather than the heavy leather hip gun belt. Dr. Koprivica and Dr. Huang felt claimant would be capable of attempting the sheriff's duties with this accommodation and with the additional accommodation that claimant be placed upon pain medication other than Darvocet. The response letter provided by claimant raised numerous issues dealing with seniority, vacation time, sick leave, and other issues including a request for a description of the job. The Appeals Board finds this to be an unreasonable response on claimant's part and the letter constitutes a constructive rejection of the sheriff's position.

The Kansas Court of Appeals in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), in harmonizing the principles of Foult, *supra*, with the language of K.S.A. 44-510e(a), obligates the fact finder to decide whether a claimant has made a good faith effort to find appropriate post-injury employment. If a finding is made that a good faith effort has not been made to find appropriate employment, the fact-finder is

obligated to determine an appropriate post-injury wage based upon the evidence presented before it, including expert testimony concerning the claimant's capacity to earn wages.

In considering the correspondence between claimant and respondent, the Appeals Board finds respondent provided claimant the opportunity to return to work in an accommodated position at a comparable wage within the restrictions of Dr. Huang and Dr. Koprivica. Claimant's letter of June 1996 raised significant road blocks to that response.

In addition, claimant's attempts to obtain employment as a computer programmer, a position for which claimant did not appear to be well trained or well qualified, does not constitute a good faith effort by claimant to obtain employment subsequent to the injury. The Appeals Board therefore finds pursuant to Copeland the Board is obligated as the finder of facts to determine an appropriate post-injury wage upon which to base a work disability. The Appeals Board finds that claimant had the ability, with appropriate accommodation, to return to work as a deputy sheriff at a wage comparable to that which claimant was earning at the time of the injury. Therefore, based upon K.S.A. 44-510e, claimant is limited to his functional impairment of 4 percent to the body as a whole.

Respondent's request for credit for retirement or sick leave is denied as K.S.A. 44-501(h) allows a reduction in retirement benefits (but not sick leave) but restricts the award to a minimum of the employee's functional impairment. In this instance, as claimant has been awarded 4 percent to the body as a whole which is claimant's functional impairment, no additional retirement or sick leave credit is allowable under K.S.A. 44-501(h).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated May 12, 1997, should be, and is hereby, modified and the claimant, Rodney D. Tibbits, is granted an award against the respondent, Shawnee County, a qualified self-insured, for an injury occurring through November 14, 1994, and based upon an average weekly wage of \$726.31, for a 4% permanent partial disability to the body as a whole.

Claimant is entitled to 6 weeks temporary total disability compensation at the maximum rate of \$319 per week in the amount of \$1,914 followed thereafter by 16.6 weeks permanent partial disability compensation at the statutory maximum \$319 per week totalling \$5,295.40 for a total award of \$7,209.40 all of which is due and owing at the time of this award and ordered paid in one lump sum minus amounts previously paid.

Unauthorized medical up to the statutory maximum is ordered paid upon presentation of authorized statement verifying same.

Claimant's attorney's fee contract is approved to the extent it doesn't violate K.S.A. 44-536.

Claimant is awarded future medical upon proper application to and approval by the Director.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed through respondent to be paid as follows.

Appino & Biggs Reporting Service	\$1,294.60
Larry L. Thibault, CSR	(Amount Unknown)
Nora Lyon & Associates	\$ 126.00

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Beth Regier Foerster, Topeka, KS
Larry G. Karns, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director